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Supreme Court, U.S.
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No. 93-352

In The

Supreme Court of the United States

October Term, 1993

MARK E. VREELAND, *Petitioner,*

v.

JAMES TOWNSEND; LYNN HARDAWAY; DONALD HORVATH; PAT LAUWERS; JAMES GRUBER; RICHARD SWEAT; VINCENT BURKEY; DANIEL BALINO; MONROE COUNTY CENTRAL DISPATCH; MICHAEL MURPHY; WILLIAM FREY; MONROE COUNTY PROSECUTOR'S OFFICE, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS', TOWNSEND, HARDAWAY, HORVATH, LAUWERS, GRUBER, SWEAT, BURKEY, BALINO, MONROE COUNTY CENTRAL DISPATCH, FREY, AND MONROE COUNTY PROSECUTOR'S OFFICE,

BRIEF IN OPPOSITION

TO PETITIONER'S REQUEST FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE MONROE COUNTY CENTRAL DISPATCH AND THE MONROE COUNTY PROSECUTOR'S OFFICE WERE IMPROPERLY NAMED PARTY DEFENDANTS?

II.

WHETHER RESPONDENT PROSECUTOR, WILLIAM FREY, WAS ENTITLED TO ABSOLUTE IMMUNITY AND THUS, DISMISSAL FROM THE PETITIONER'S COMPLAINT AS A MATTER OF LAW?

III.

WHETHER THE PETITIONER FAILED TO STATE OR SUPPORT A CLAIM AGAINST MONROE COUNTY FOR A CIVIL RIGHTS VIOLATION PURSUANT TO 42 U.S.C. 1983?

IV.

WHETHER RESPONDENTS WERE ENTITLED TO DISMISSAL OF THE STATE LAW CLAIMS AGAINST THE MUNICIPALITY, THE RESPONDENT PROSECUTOR, AND THE INDIVIDUAL DEPUTIES AND DISPATCHERS?

V.

WHETHER THE INDIVIDUAL DISPATCHERS AND DEPUTIES WERE ENTITLED TO SUMMARY JUDGMENT?

VI.

WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT FURTHER DISCOVERY WAS UNWARRANTED UNDER THE FACTS OF THE INSTANT CASE?

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RESPONDENTS', TOWNSEND, HARDAWAY, HORVATH, LAUWERS, GRUBER, SWEAT, BURKEY, BALINO, MONROE COUNTY CENTRAL DISPATCH, FREY, AND MONROE COUNTY PROSECUTOR'S OFFICE,

BRIEF IN OPPOSITION

TO PETITIONER'S REQUEST FOR CERTIORARI

COUNTER-STATEMENT OF FACTS

On April 23, 1988, Petitioner suffered a temporary loss of his senses and control as a result of ingesting drugs and alcohol. Beginning at 1:53 a.m., he constantly called the Monroe County Central Dispatch. Respondents, TOWNSEND, HARDAWAY, LAUWERS and GRUBER, were on duty. (R.2, Plaintiff's Complaint, p. 3, ¶ 2). Petitioner informed the dispatcher that he was "possessed", felt a "force" from outer space, and made other comments allegedly showing that he was in "dire need of help". (R.40, Exhibit A, Supplemental Report, pp. 1, 51). Petitioner further alleged that the Respondent Dispatchers'

remarks and their tone of voice caused him to suffer a further loss of control which compelled him to leave his home with a can of beer and his shotgun. (R.2, Plaintiff's Complaint, p. 4, ¶ 3).

At 2:20 a.m., Respondent Hardaway finally obtained Petitioner's address. However, another emergency call was received and the available deputies were dispatched on that call. (R.40, Defs' Mot. for Summary Judgment, Exhibit A, p. 1, ¶ 2). Deputy Bellino was asked to go to the Petitioner's home and check for activity. Dispatcher Hardaway recommended that Deputy Bellino, as a single unit, not approach the house because of the Petitioner's crazy conversations. (R.40, Defs' Mot. for Summary Judgment, Exhibit A, p. 1, ¶ 2).

At 2:52 a.m., Dispatcher Hardaway spoke with the Petitioner again. The Petitioner informed Hardaway that he wanted to kill his mother, that he was going to walk to her house, and that he had a "45". He said that he would kill anyone who came near him and began moaning. Dispatcher Hardaway asked Respondent Gruber to pass this information along to Deputy Bellino. (*Id*, p. 1, ¶ 3).

At approximately 3:00 a.m., Deputy Bellino was dispatched to another location to assist in an uncontrolled "bonfire". (*Id*, p. 1, ¶ 4). At 3:10 a.m., Dispatcher Hardaway received a telephone call from Bill Younglove, who requested a car at 266 E. Hurd. Mr. Younglove believed the Petitioner had just left his residence, was possibly armed, and was going to kill his mother who lived in Willow Green. At that time, Deputy Bellino radioed that the Petitioner was located at Monroe and Hurd and that the Petitioner had a gun. (R.40, Defs' Mot. for Summary Judgment, Exhibit A, pp. 1-2, ¶ 4).

While traveling north on N. Monroe, Deputy Bellino observed Petitioner walking south along the east shoulder of the road. He observed Petitioner carrying a rifle or shotgun over his right shoulder. Petitioner was

smiling, nodding his head, and was yelling at him. Deputy Bellino turned his patrol car around, shined a spotlight on Petitioner, and rolled down his window. Petitioner yelled "I'm evil and I'm going to kill you". Petitioner, holding the weapon waist-high, pointed it directly at the Deputy.[1]

Deputy Bellino immediately turned off the spotlight, contacted dispatch for back-up assistance, and backed the patrol vehicle to Hurd Road and positioned the vehicle facing southeast on West Hurd at N. Monroe. Petitioner was approximately one tenth of a mile north of Hurd Road.

Deputy Bellino turned off the headlights to the patrol vehicle and heard Petitioner yelling, "I'm evil, you're going to have to kill me". (R.40, Exhibit F, p. 3). Pointing the weapon at Deputy Bellino. Deputy Bellino loudly instructed Petitioner to freeze and drop his weapon, approximately fifteen times. Petitioner put the weapon back over his shoulder. (R.40, Exhibit F, pp. 3-4).

Deputy Bellino called Petitioner by name, pleading that he put down his weapon and talk. Petitioner continued to walk toward Deputy Bellino's position, continuously repeating "It's me or you, it's me or you." Respondent Bellino again pleaded with Petitioner to put down the weapon. Within 50 yards of Respondent Bellino, Respondent Bellino could see that Petitioner continued to advance with the weapon in front of him. (R.40, Exhibit F, p. 4).

Respondent Bellino fired a warning shot near Petitioner to stop his forward aggression. Petitioner hesi-

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[1] **Respondent, MICHAEL MURPHY, is employed by the Michigan Department of State Police and conducted an investigation into the series of events leading to the shooting of the Petitioner. (R.2, Plaintiff's Complaint, p. 8). Although Monroe County Sheriff Walter O. Trowbridge, Deputy Carl VanWert, Chief Canavel, and the 9-1-1 agency were named, these Defendants were dismissed on June 13, 1991 for lack of prosecution. (R.22, Order Dismissing Claims Against Trowbridge, 9-1-1 Agency, VanWert and Canavel.**

tated for a few seconds, but continued to walk toward Deputy Bellino. A state patrol unit had arrived from the north. He could hear the state officers yelling to Petitioner to drop the gun. Petitioner kept stating "I'm evil, I'm evil, I'm going to kill you. Shoot me, come on." Respondents Sweat and Burkey arrived and pulled up very close to where Petitioner was standing. Petitioner pointed the weapon at Respondent Sweat when he exited the patrol car. Respondent Sweat took cover using his patrol unit. (*Id*).

All law enforcement officers yelled at Petitioner to drop his weapon, but Petitioner refused and the stand-off continued for 2-3 minutes. Petitioner again pointed the gun at Respondent Bellino, then at Respondent Sweat, at the state officer, and again at Respondent Sweat. Petitioner continued this process, each time flinching forward as if to shoot, but he did not fire. Petitioner started walking toward Respondent Bellino. When within 20 feet of Respondent Bellino, he was again ordered to stop and drop his weapon, but he did not and pointed the gun directly at Deputy Bellino. His attempt to fire was unsuccessful. (R.40, Exhibit E, pp. 4-5). Deputy Bellino ejected the round and chambered another while Petitioner advanced, continuously stating "Kill me, shoot me, it's me or you." Deputy Bellino ordered Petitioner to stop and drop the weapon one final time. When Petitioner refused, Respondent Bellino fired one round at Petitioner, hitting him in the right arm, and knocking him down. (R.50, p. 5).

Exhibit J – Information Felony Sheets:

After review of Murphy's investigation materials, Respondent Prosecutor Frey sought and obtained a warrant charging Petitioner with two counts of Assault with a Dangerous Weapon (upon Respondents Bellino and Sweat) and one count of Felony Firearm. (R.40, Defs' Mot. for Summary Judgment, Information Felony). On April 26, 1988, Petitioner was arraigned and bond set.

On May 6, 1988, a preliminary examination resulted in a bind-over for trial on the three charges. (R.40, Exhibit K, Prel. Exam).

As evidenced by Exhibit K, pursuant to the agreement, Count IV was added charging Petitioner with Attempted Felonious Assault. Further to the *Amended Information*, (R.40, Exhibit J), Petitioner agreed to plead no contest to Count IV, and that the first three Counts (two Counts Felonious Assault and one Count Felony Firearm) would be dismissed. (R.40, Exhibit M, p. 5).

Prior to accepting this agreement, the Honorable William F. Lavoy, Monroe County Circuit Judge, conducted a lengthy hearing relative to Petitioner's understanding of the agreement, including the differences between a misdemeanor and a felony, and the fact that he would be waiving several rights guaranteed to him if he were to be tried on the original charges, including available defenses. (R.40, Exhibit M, pp. 4-5).

Petitioner indicated several times that he fully understood the consequences of his plea and his attorney informed the Court that, in fact, that morning he and Petitioner had reviewed the applicable statutes regarding Count IV of the Amended Information relative to the misdemeanor/felony question. (R.40, Exhibit M, p. 7). The Court accepted Petitioner's plea. Rescheduling the matter for 4:30 p.m. to permit preparation of the Presentence Report, Petitioner was sentenced to serve 340 days in the Monroe County Jail, with credit for 340 days served. He was advised of his appeal rights. (R.40, Exhibit M, pp. 12, 19).

INTRODUCTION

A. Standard Of Review

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion,

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts material. The moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. '[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . .' *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).
>
> *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23; 106 S.Ct. 2548, 2552; 91 L.Ed.2d 265 (1986).

One of the principal purposes of the summary judgment rule is to "isolate and [dispose] of factually unsupported claims . . . ." 106 S.Ct. at 2553. The intent *not* to shift the burden to the defendant was bolstered by the fact that the federal district courts possess the power to enter a summary judgment *sua sponte*. *Id.* at 2554. *The burden remains upon the plaintiff* once the summary judgment is asserted to establish a genuine issue of material fact that would affect the outcome of the litigation. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 248; 106 S.Ct. at 2505; 91 L.Ed.2d at 211. In the instant case, the trial court properly concluded that no outcome determinative fact was in dispute and thus, properly entered judgment for the Respondents. Therefore, Petitioner's Petition for Certiorari should be denied.

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REASONS FOR DENYING THE WRIT

I.

THE MONROE COUNTY CENTRAL DISPATCH AND THE MONROE COUNTY PROSECUTOR'S OFFICE WERE IMPROPERLY NAMED PARTY DEFENDANTS.

> Each organized county shall be a body corporate with powers and immunities provided by law.
>
> Const. 1963, art 7, sec 1.

Authority for the offices of county sheriffs and prosecutors is found in the 1963 Michigan Constitution, Art 7, Sec 4. Pursuant to this authority, only the Monroe County Sheriff can organize and operate a system designed to dispatch his deputies in emergency situations. As a function of the Monroe County Sheriff, the Central Dispatch is only a department. Similarly, employees of a county prosecutor hold office at the pleasure of the prosecuting attorney. M.C.L. 49.35; M.S.A. 5.795. Neither the sheriff's department nor the prosecutor's office can be sued since they are administrative departments of the County and do not enjoy a separate legal identity.[2] Since the Monroe County Central Dispatch and Monroe County Prosecutor's Office are *not* separate entities, dismissal pursuant to the provisions the Federal Rules of Civil Procedure was appropriate.

II.

THAT RESPONDENT PROSECUTOR, WILLIAM FREY, IS ENTITLED TO ABSOLUTE IMMUNITY AND THUS, DISMISSAL OF THE PETITIONER'S COMPLAINT AS A MATTER OF LAW.

Respondent Frey is absolutely immune from liability under 42 U.S.C. 1983. In *Imbler* v. *Pachtman*, 424 U.S. 409;

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[2] Fed. R. Civ. P. 17(b); *Davis* v. *Chrysler Corp.*, 151 Mich. App. 463; 391 N.W.2d 376 (1986); citing *McPherson* v. *Fitzpatrick*, 63 Mich. App. 461, 464; 234 N.W.2d 566 (1975). *Rhodes* v. *McDaniel*, 945 F.2d 117 (6th Cir. 1991).

96 S.Ct. 984 47 L.Ed.2d 128 (1976), the Court held that a prosecutor enjoys absolute immunity from suit under 42 U.S.C. 1983, when he acts within the scope of his prosecutorial duties. 424 U.S. at 420.

In *Johnson* v. *Granholm*, 662 F.2d 449 (6th Cir. 1981), cert. den. 102 S.Ct. 2933 (1981), the strict standard stated in *Imbler* was adopted. Undisputedly, Prosecutor Frey was acting within the scope of those duties normally assigned to prosecuting attorneys under the laws of the State of Michigan. Respondent Frey had the discretion to institute the criminal proceedings against Petitioner. A prosecutor's discretion includes the decision to enter into and recommend acceptance of plea agreement.

Most importantly, Petitioner failed to present evidence establishing that Respondent Frey acted outside the prosecutorial function.[3] For that reason, the trial court properly granted summary judgment of this claim.

III.

THE PETITIONER FAILED TO STATE OR SUPPORT A CLAIM AGAINST MONROE COUNTY FOR A CIVIL RIGHTS VIOLATION PURSUANT TO 42 U.S.C. 1983.

A. Petitioner Failed To Plead Municipal Liability Because The Petitioner Could Not Establish An Affirmatively Adopted Unconstitutional Policy, Custom, Or Practice That Directly Caused The Injury.

Petitioner must prove that his injuries were the result of a custom, policy, or practice of the entity upon which its officers acted in order to prevail. *Monell* v. *Dep't of Social Services*, 436 U.S. 658; 98 S.Ct. 2018; 56 L.Ed.2d 611 (1978), stated that municipalities:

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[3] *Buckley* v. *Fitzsimmons*, ___ U.S. ___; 61 USLW 4713 (1993).

> Can be sued directly under Section 1983 for monetary, declaratory or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.
>
> 436 U.S. at 690.

"Although practices of state officials could well be so permanent and well settled as to constitute a custom or usage with the force of law, a municipality cannot be held liable solely because it employs a tortfeasor." 436 U.S. at 691. The official policy or custom must be *the* "moving force of the constitutional violation . . ." A municipality cannot be held liable unless it has created an "official policy which is the equivalent of an affirmative act causally related to the incident". 436 U.S. at 695.

In *Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985), the Court held that a single act of misconduct by a street officer was insufficient to impose liability against the municipality. The need for a *strong* "affirmative link" or "causal connection" between the policy and the claimed unconstitutional deprivation was recognized:

> . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise, the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the unconstitutional deprivation . . .
>
> *Tuttle*, 471 U.S. at 823-24.

The *Tuttle* Court was unwilling to extend liability to a municipality when its policies were constitutional on their face. A result to the contrary exposes municipalities to vicarious liability because every action by a municipal employee would find its eventual origin in a policy of the municipality. For that reason, the term "policy" must involve a "course of action consciously chosen from among various alternatives." *Id.*

In the instant action, Petitioner simply concluded that his civil rights were violated by all of the Monroe County Respondents. In fact, Petitioner failed to submit any support of an unconstitutional policy statement, policy, ordinance, regulation, or decision officially adopted or promulgated by Monroe County, its Sheriff, or Prosecutor. Thus, Petitioner failed to establish a cognizable 1983 claim against Monroe County, its Sheriff, or Prosecutor, and dismissal of Petitioner's Complaint was required.

B. No Constitutional Right Was Violated.

A special relationship to protect an individual has been recognized, however, only in those circumstances where there is physical control over that person's physical being, such as incarceration or involuntary commitment. (R.56, Magistrate's Report and Recommendation, p. 15 relying on *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189; 109 S.Ct. 998, 1004-1006; 103 L.Ed.2d 249 (1989).[4] The Sixth Circuit has not yet recog-

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[4] **The Michigan Courts have also refused to impose an affirmative duty to act in negligence cases or civil rights cases. In *Markis* v. *City of Grosse Pointe Park*, 180 Mich. App. 545; 448 N.W.2d 352 (1989), the plaintiff's car was struck by another vehicle two hours after the police officers had cited its driver for driving through a red light. Since the driver was visibly intoxicated at the time of the initial stop, the officers allegedly should have prevented her from further driving after she was issued that citation. The officer, however, was following a city policy prohibiting the detainment of residents suspected of drunk driving unless they were involved in either an accident or a high speed chase.**

nized a duty to protect a member of the general population from harm. *Walton* v. *Southfield*, 995 F.2d 1331 (6th Cir. 1993). There, the plaintiffs asserted that the officers caused their predicament.

In that matter, the Michigan Court of Appeals reversed the trial court order denying summary disposition finding that the facts did not create a special relationship to protect the plaintiff. Specifically, the officer's duty was owed only to the general public.[5]

In *Reeves by Jones* v. *Besonen*, 754 F. Supp. 1135 (E.D. Mich. 1991), the duty to protect or take affirmative action was not imposed where the football coach failed to prevent a "hazing" ritual that regularly occurred on the bus after each game:

> There is no indication in the facts before the court that [plaintiff's] participation was compulsory, or that riding the school bus on the night of October 17, 1986 amounted to "incarceration" or "involuntary commitment" or "police custody", or anything of that sort. In the absence of such state coercion, *DeShaney* makes clear that the Constitution imposes *no duty* on the state to care for plaintiff's safety.
>
> *Reeves*, 754 F. Supp at 1140. (Emphasis added).

In *Balistreri* v. *Pacifica Police Dep't*, 855 F.2d 1421, 1425 (9th Cir. 1988), the plaintiff alleged a violation of her due process right to liberty resulted from the failure of the police to take steps to respond to continued threats, harassments, and/or violence toward her by her

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[5] **See also, *Isabella County* v. *Michigan*, 181 Mich. App. 99; 449 N.W.2d 111 (1989); *Eichhorn* v. *Lamphere School District*, 166 Mich. App. 527; 421 N.W.2d 230 (1987); *Morse* v. *City of Mt. Pleasant*, 160 Mich. App. 741; 408 N.W.2d 541 (1987), rev'd to argue, 431 Mich. 888-895; 432 N.W.2d 298 (1988); *Trimper* v. *Headapohl*, 434 Mich. 585; 450 N.W.2d 559 (1989); *Simonds* v. *Tibbitts*, 165 Mich. App. 480; 419 N.W.2d 5 (1987).**

estranged husband. The court refused to recognize a special relationship between the state official and a particular member of the public where no custodial or other relationship existed obligating the police to protect the victim's safety. The Court stated "[T]he state's awareness of the victim's plight, by itself, will not create a 'special relationship'." 855 F.2d at 1426.[6]

Respondents also incorporate by reference the Magistrate's authorities and arguments in her Report and Recommendation. Magistrate Morgan concluded that the cases relied upon by the Petitioner can be distinguished on the basis that all those cases involved the State intervention prior to the alleged injury. (R.56, Magistrate Morgan's Report and Recommendation, p. 16).

To impose liability through a special relationship in the instant case would be an unwarranted expansion of the federal civil rights law.

C. Petitioner Failed To Plead Or Support A Claim For Supervisory Liability.

As noted by the Magistrate's Report and Recommendation, liability of supervisory personnel would not lie in the instant matter because a plaintiff must show that the supervisor encouraged a specific incident of misconduct or in some way, directly participated in it. (R.56, Magistrate's Report and Recommendation, pp. 8-9, quoting *Bellamy* v. *Bradley*, 729 F.2d 416, 421 (6th Cir. 1984), cert. denied, 105 S.Ct. 156 (1985).[7]

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[6] **The court, however, concluded that the Restraining Order together with the defendants' repeated notice of Balistreri's plight was sufficient to state a constitutional violation based upon the failure to take reasonable measures to protect Balistreri from her estranged husband.**

[7] **See also M.C.L. 51.70; M.S.A. 5.863, which provides that a sheriff or sheriff's department cannot be vicariously liable for the acts of its deputies.**

Therefore, summary judgment was properly granted. Petitioner failed to establish any connection between the ultimate result and the supervisor's actions. No evidence of similar incidents was provided to the Court. *Tuttle*, *supra*. Petitioner failed to establish that any alleged tortious action by the supervisor occurred pursuant to any established policy or that his actions established policy.

Petitioner failed to establish a claim of improper supervision since Petitioner failed to establish a history of widespread abuse within Monroe County. Petitioner also failed to establish that these individually-named Respondents acted improperly in the past and were not disciplined. *Russo* v. *Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). *Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983). *Leach* v. *Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989). For all the above reasons, Respondents assert that the trial court properly granted summary judgment on this claim.

D. Petitioner Failed To Establish A Claim For An Alleged Failure To Train.

In *Canton* v. *Harris*, 489 U.S. 378; 109 S.Ct. 1197; 103 L.Ed.2d 412 (1989), the Court addressed the requisite standard consistent with the *Monell* rationale. A direct causal link between the alleged conscious decision *not* to train and the alleged constitutional deprivation must exist. The failure to train must amount to deliberate indifference to the rights of the people with the police come into contact. 109 S.Ct. at 1204.

The following criteria must be met for liability to attach in this circumstance:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks that the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suf-

> fice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program . . . To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under Section 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a Section 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate accident . . . Thus, permitting cases against cities for their "failure to train" employees to go forward under Section 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities – a result we rejected in *Monell*, 436 U.S. at 688-694 . . . 109 S.Ct. at 1205-06.

Petitioner failed to support any inference that Monroe County made a decision not to train despite a recognized need. Petitioner failed to satisfy the constitutional standard required. *Canton*. Most importantly, Petitioner cannot identify the alleged deficiency was caused by the claimed deprivation. The evidence did not support any alleged prior knowledge of a similar problem and a deliberate decision to not train with respect to the constitutionally tortious actions. *Russo*, *supra*. For that reason, the trial court properly dismissed this claim.

IV.

RESPONDENTS WERE ENTITLED TO DISMISSAL OF THE STATE LAW CLAIMS AGAINST THE MUNICIPALITY, THE RESPONDENT PROSECUTOR, AND THE INDIVIDUAL DEPUTIES AND DISPATCHERS.

A. The Entity Was Entitled To The Complete Protection Of The Governmental Immunity Doctrine.

A political subdivision of the State of Michigan is absolutely immune from tort liability. M.C.L. 691.1407;

M.S.A. 3.996(107) provides that a governmental agency shall be immune from tort liability when it is engaged in the exercise or discharge of a governmental function. A "governmental function" is defined as "any activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." M.C.L. 691.1401(f); *Ross* v. *Consumers Power Co.*, 420 Mich. 567; 363 N.W.2d 641 (1984).

If the **general activity** in which the governmental agency was engaged at the time the tort was allegedly committed was authorized, then immunity attaches. *Smith* v. *Dep't of Public Health*, 428 Mich. 609; 410 N.W.2d 749 (1987); *Ross*, *supra*. In this case, police operations and the prosecution of Petitioner are the exercise of a governmental function. Thus, Monroe County, was absolutely immune from tort liability under Michigan law. *Meadows* v. *City of Detroit*, 164 Mich. App. 418; 418 N.W.2d 100 (1987).

The Respondent County could not be held responsible under the theory of *respondeat superior* for the claimed intentional torts of it's police officer in this case. *Slanga* v. *City of Detroit*, 152 Mich. App. 220; 393 N.W.2d 487 (1986), rev'd on other grounds, 429 Mich. 893 (1988). There, the plaintiff argued that intentional torts allegedly committed by governmental employees, including assault and battery, false arrest and malicious prosecution, were excepted from immunity under *Ross*, *supra*. In examining the question of vicarious liability for the City, the *Slanga* Court stated:

> Under *Ross*, *supra*, a governmental agency can only be held vicariously liable for the torts of its employees if the tortfeasor was acting during the course of employment and within the scope of his authority. Even if these two conditions are met, liability can only be imposed if the tortfeasor was engaged in a non-governmental or proprietary function or an activity which falls within a statutory exception.

> (I)f the activity in which the tortfeasor was engaged in at the time the tort was committed constituted the exercise or discharge of a governmental function . . . the agency is immune pursuant to section 7 (MCL 691. 1407; MSA 3.996(107)) of the Governmental Immunity Act . . .
>
> *Slanga*, 152 Mich. App. at 224-225.

If, as Petitioner contends, the Officers committed alleged intentional torts, then they were not acting within the scope of their authority and the County of Monroe cannot be vicariously liable for her actions. Conversely, if the officers were acting within the scope of their authority, they were performing governmental functions and the County is likewise immune. Quite simply stated, municipalities cannot be held responsible for the alleged intentional torts of their employees.

B. The Individual Prosecutor Was Entitled To Absolute Immunity.

As with Petitioner's claims under 42 U.S.C. 1983, in the State of Michigan, a prosecuting attorney is absolutely immune from liability while performing prosecutorial functions and duties. *Payton* v. *Wayne County*, 137 Mich. App. 361; 357 N.W.2d 700 (1984), citing *Imbler* v. *Pachtman*, *supra*, wherein the Court of Appeals concluded:

> Thus, Michigan law also favors the *Imbler* policy of protecting the prosecutor's independence of judgment from harassment due to the constant threat of potential litigation . . .
>
> 357 N.W.2d at 705.

As the highest elected official, County Prosecuting Attorney, Respondent Frey, is also **absolutely, governmentally immune** from Petitioner's claims:

> We therefore hold that judges, legislators, and the highest executive officials of all levels of government are absolutely immune from all tort lia-

> bility whenever they are acting within their judicial, legislative, or executive authority . . . (Emphasis added).
>
> *Ross, supra*, 420 Mich. at 592; 363 N.W.2d at 667.[8]

Petitioner's Complaint was based upon the actions of Prosecutor Frey taken during the fulfillment of his prosecutorial duties. Thus, Respondent Frey was entitled to dismissal as a matter of law.

C. Individual Deputies And Dispatchers Were Entitled To Summary Judgment As A Matter Of Law.

1. INDIVIDUAL RESPONDENTS WERE ENTITLED TO SUMMARY JUDGMENT OF ANY STATE TORT CLAIMS BECAUSE THEIR DUTY IS NOT OWED TO ANY PARTICULAR PLAINTIFF, BUT TO THE GENERAL PUBLIC.

Respondents adopt by reference the Arguments and authorities cited herein which are incorporated by reference for purposes of this Argument. See Argument V, subsection C(1). Duty is a necessary element to set forth a cognizable claim of negligence. *Moning* v. *Alfono*, 400 Mich. 425, 437; 254 N.W.2d 759 (1977). Duty is defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct towards another." *Eichhorn, supra*. Absent a special relationship between parties, a public official owes a duty to the general public and not to any one individual in society. *Markis, supra*.

After receiving several obscene, menacing, and threatening phone calls from Petitioner, some perhaps, unprofessional remarks were made by the Respondent dispatchers. However, Petitioner has failed to establish a special relationship existed between Petitioner and the

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[8] **See also *Meadows* v. *Detroit*, 164 Mich. App. 418; 418 N.W.2d 100 (1987); *Marrocco* v. *Randlett*, 431 Mich. 700; 433 N.W.2d 68 (1988); *Bischoff* v. *Calhoun County Prosecutor*, 173 Mich. App. 802; 434 N.W.2d 249 (1988); and *Washington* v. *Starke*, 173 Mich. App. 230; 433 N.W.2d 834 (1988).**

Respondent dispatchers during the thirty-five plus telephone calls. These dispatchers had a duty to the general public to keep these lines clear.

Petitioner has failed to show how the comments made by the Respondent dispatchers actually forced or caused him to leave his home with the shotgun and a beer for the purpose of initiating a confrontation in an attempt to be shot and killed by any officer. *Poe* v. *Detroit*, 179 Mich. App. 564; 446 N.W.2d 523 (1989).

2. THE INDIVIDUALS WERE ENTITLED TO GOVERNMENTAL IMMUNITY.

The individual deputies and dispatchers would be entitled governmental immunity as a lower level employees under the applicable test which is set forth as follows:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment, of service or volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member of volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

> (c) The officer's employee's member's or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.
>
> MCL 691.1407(2)(C); MSA 3.996(107).

Since no gross negligence can be established, no claim in avoidance of governmental immunity can be established. See *Montgomery* v. *Detroit*, 181 Mich. App. 298; 448 N.W.2d 822 (1989); *Vermilya* v. *Dunham*, 195 Mich. App. 79; 489 N.W.2d 496 (1992).

3. NO CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAN BE ESTABLISHED.

Respondents rely on the Magistrate's Report and Recommendation for the position that the Respondents' conduct did not rise to the level to constitute an intentional infliction of emotional distress tort. *Tope* v. *Howe*, 179 Mich. App. 91, 107; 445 N.W.2d 250 (1989). Determining that the words used in these circumstances did not amount to outrageous or atrocious conduct, but were merely trying to make the Petitioner stop calling 911. (R.56, Magistrate's Report and Recommendation, p. 22-23).[9]

4. NO CLAIM FOR DEFAMATION CAN BE ESTABLISHED.

In order to state a claim for defamation, plaintiff must demonstrate:

> (a) a false and defamatory statement concerning plaintiff; (b) an unprivileged publication to a third party; (c) fault amounting at least to

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[9] **See also *Tope*, *supra*; *Hall* v. *Citizens Ins. Co. of Michigan*, 141 Mich. App. 676, 684; 368 N.W.2d 250 (1985); *Hall* v. *Pizza Hut of America, Inc.*, 153 Mich. App. 609, 616; 396 N.W.2d 809 (1986); and *Coogan* v. *City of Wixom*, 820 F.2d 170, 174 (6th Cir. 1987).**

> negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special arm (defamation per se) or the existence of special harm caused by the publication (defamation per quod).
>
> *Rouch* v. *Enquirer & News of Battle Creek*, 427 Mich. 157, 398 N.W.2d 245, 252 (1986) citing, 3 Restatement Torts 2d § 558; and *Postill* v. *Booth Newspapers*, 118 Mich. App. 608, 618, 325 N.W.2d 511 (1982).

The Report and Recommendation concluded that Plaintiff alleged only that a false and defamatory statement was made about him. Plaintiff also failed to allege that Defendants' publication was defamation per se or that he has suffered any harm. Plaintiff failed to allege any facts to support a defamation claim. (R.56, Magistrate's Report and Recommendation, pp. 23-24).

Respondents hereby incorporate by reference the authorities and arguments relied upon by Magistrate Morgan in support of the dismissal of the claim for defamation.

V.

INDIVIDUAL DISPATCHERS AND POLICE OFFICERS WERE ENTITLED TO SUMMARY JUDGMENT.

A. The Allegations Against The Individuals Rose To The Level Of Negligence Only And Failed To Establish A Constitutional Violation.

42 U.S.C. 1983 provides a cause of action for the deprivation of rights, privileges or immunities secured by the constitution and laws of the United States.[10] Petitioner

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[10] *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144; 90 S.Ct. 1598; 26 L.Ed.2d 142 (1970); *Monroe* v. *Pape*, 365 U.S. 167; 81 S.Ct. 474; 5 L.Ed.2d 492 (1961); *Parratt* v. *Taylor*, 451 U.S. 527; 101 S.Ct. 1908; 68 L.Ed.2d 420 (1981); *Gomez* v. *Toledo*, 446 U.S. 635; 100 S.Ct. 1920; 64 L.Ed.2d 572 (1980).

alleged that Respondents, Townsend, Hardaway, Lauwers, and Gruber, as the dispatch operators on duty April 23, 1988, were negligent in their response to Petitioner's thirty-five plus telephone calls. However, Petitioner failed to allege which right, privilege, or immunity secured by the Constitution or laws of the United States was violated by the allegedly negligent acts of these Respondents. To the contrary, mere negligence by an official is insufficient to establish a constitutional deprivation.[11]

Moreover, suggestions of negligence is insufficient:

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law. *Daniels*, 474 U.S. at 332.

In order to establish a constitutional violation recognized under 42 U.S.C. 1983, an intentional deprivation must exist. In *Daniels*, *supra*, the Court stated:

> . . . Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law and laying down rules of conduct to regulate liability for injuries that attend living together in society . . . 474 U.S. at 332.

Although the holding in *Daniels* applied to due process claims under the 14th Amendment, the Court's intention is clear. The Constitution of the United States is not intended to provide potential plaintiffs with constitutional claims which are based on an array of tort concepts available to claimants under state law. Rather,

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[11] *Davison* v. *Cannon*, 474 U.S. 344; 106 S.Ct. 668; 88 L.Ed.2d 677 (1986); *Daniels* v. *Williams*, 474 U.S. 344; 106 S.Ct. 662; 88 L.Ed.2d 662 (1986). See also *Moore* v. *City of Detroit*, 128 Mich. App. 491; 340 N.W.2d 640 (1983).

an intentional deprivation is required before an act will be scrutinized under a constitutional analysis.

Relying on *Davidson* v. *Cannon*, *supra*, the lower court also concluded that the allegation against the individual Respondents rise to the level of negligence only.[12] Relying on *Nishyama* v. *Dickinson Co., Tenn.*, 814 F.2d 277 (6th Cir. 1987), the Report and Recommendation stated:

> In our view, a person may be said to act in such a way as to trigger a Section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it was highly probable that harm would follow.
>
> (R.56, Magistrate's Report and Recommendation, p. 13, citing *Nishyama*, *supra*, 814 F.2d at 282).

Magistrate Morgan noted that Petitioner only identified one risk of harm that was made known to the deputies; Petitioner had threatened to kill his mother. That threat was corroborated and the individual Respondents responded promptly to that known risk. Petitioner's suggestion that the Respondents should have done something different without evidence that any plan of action would have altered the result was not presented. It was unclear, by any stretch of the imagination, that the acts of these particular Respondents proximately caused the ultimate confrontation by the Petitioner. Therefore, the trial court properly granted summary judgment on the basis that the Petitioner

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12 **See also, *Brandenburg* v. *Cureton*, 882 F.2d 211 (6th Cir. 1989). Evidence of "poor procedural preparation" prior to serving a warrant fails to support a violation of constitutional proportion.**

failed to state or support a claim that rose to the level of a constitutional violation.[13]

B. Petitioner Cannot Establish A Special Relationship To Support A Duty Of Care That Was Owed To This Specific Plaintiff Rather Than To The General Public.

The Petitioner asserted that the dispatchers had a special relationship with this particular Petitioner. In essence, the Petitioner concluded that the Petitioner's calls to the dispatchers imposed a duty upon the dispatchers to protect Petitioner from himself. (R.56, Magistrate's Report and Recommendation, p. 14).

Respondents adopt and incorporate by reference those arguments and authority asserting that these Respondents did not develop a special relationship for purposes of either civil rights or state tort liability. (See Argument III, B.)

C. No Constitutional Right Was Clearly Established At The Time Of This Occurrence.

If a constitutional deprivation did occur, then the question is whether the constitutional right was clearly established in the Sixth Circuit at the time of the alleged occurrence.[14] *Eugene D. By and Through Oliviad*

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[13] *Moore* v. *Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985), allegations of abandonment of a 15 year old did not rise to the level of a constitutional violation. There, the police officers left a 15 year old alone in a camper overnight after the arrest of her parents. The mother requested that her daughter not be left in the camper alone. The officers informed her that the minor could either stay in the camper or remain overnight in the squad car outside of the station. The mother concluded her daughter would be safer in the camper.

The court in *Moore* concluded that the facts of that case did not rise to the level of deliberate indifference sufficient to constitute gross negligence for purposes of finding a constitutional violation.

[14] See also, *Yates* v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991). The standard of review by the appellate court requires that, since qualified immunity is an issue of law, the review is *de novo*.

v. *Carmen*, 889 F.2d 701 (6th Cir. 1989) cert. den. ___ U.S. ___; 110 S.Ct. 1231; 110 L.Ed.2d 651 (1990). Since the Sixth Circuit has not recognized a constitutional deprivation arising out of the factual allegations against the individuals in the instant case, summary judgment was proper.[15]

> It is the plaintiff's burden to convince the court that the law was clearly established. *Id.* (citing *Lutz* v. *Weld County School Dist.*, 784 F.2d 340, 343-43 (10th Cir. 1986). In doing so, the plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. *Id.* (citing *Anderson* v. *Creighton*, 483 U.S. 635, 640 & n.2, 107 S.Ct. 3034, 3039 & n.2, 97 L.Ed.2d 523 (1987). Instead, the plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Hannula* v. *City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990). While the plaintiff need not show that the specific action at issue has previously been held unlawful, the alleged unlawfulness must be "apparent" in light of preexisting law. *Id.* (citing *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039). The "'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039). If the plaintiff is unable to demonstrate that the law allegedly violated was clearly established, the

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15 **Additionally, if the Court concluded that the individuals are entitled to qualified immunity on the basis that a violation of the constitutional rights was not stated or could not be supported, then it is not important whether the individuals acted pursuant to any alleged municipal policy and the entity cannot be liable either. *Rodgers* v. *Lincoln Towing Services, Inc.*, 596 F. Supp. 13 (N.D. Ill. 1984.)**

> plaintiff is not allowed to proceed with the suit. *Id.*
>
> *Hilliard* v. *City & County of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991).

In *Hilliard*, plaintiff alleged that the defendant's failure to take her into protective custody pursuant to the Colorado's Emergency Commitment Statute violated her constitutional rights to life, liberty, travel and personal integrity. The plaintiff passenger, was left stranded by the defendant officers in a high crime area after her male companion, the driver, was involved in a minor traffic accident. The plaintiff was ordered *not* to drive because she was too intoxicated to drive. After she unsuccessfully attempted to telephone for help, she returned to her vehicle. "There she was robbed and sexually assaulted by a third party . . . she was found later the next morning, stripped naked, bleeding and barely conscious." 930 F.2d at 1518.

The *Hilliard* court concluded that, since the incident occurred in May, 1988, the alleged existence of a constitutional right to personal security had not been clearly established. Thus, the individual officers were entitled to qualified immunity.

Acknowledging that two appellate court opinions had recognized a right to personal security in instances where the plaintiffs were not confined or legally constrained, the *Hilliard* Court concluded that the existence of these two cases did not "clearly establish" that a personal security guarantee was warranted in a non-custodial setting in their circuit. In fact, the court recognized that many circuits refuse to recognize a constitutional duty on the part of the state or local governments to rescue their citizens. *Id.* Moreover, the Court in *DeShaney*, *supra*, stated that a "state or local government is not required under the Due Process Clause of the Fourteenth Amendment to protect its citizens from private violence, 'or other mishaps not attributable to the conduct of its employees.'" 930 F.2d at

1520, citing *DeShaney*, 489 U.S. at 193-94, 109 S.Ct. at 1002. Therefore, as a result of inconsistent decisions by the district courts, and the United States Supreme Court's pronunciation to the contrary, the Court in *Hilliard* was unwilling to recognize a constitutional violation under those circumstances.

Acknowledging the egregious burden placed upon entities by imposing an affirmative governmental duty to provide citizens with protection, the courts have been extremely cautious in separating those individuals subject to custodial care from the individuals, who are third-party bystanders. *Courson* v. *McMillian*, 939 F.2d 1479, 1497 (11th Cir. 1991), n. 31[16].

In the instant case, Respondents respectfully submit that this Court should follow the holdings and reasoning in *Courson* and *Hilliard*. Assuming for purposes of argument only that a constitutional deprivation occurred, that constitutional right to protection was *not* recognized by the Sixth Circuit at the time of this incident. Therefore, the individual dispatchers would be entitled to qualified immunity as a matter of law.

D. The Actions Of The Individuals Were Reasonable.

When law enforcement officers act in an objectively reasonable manner, they will be entitled to qualified immunity. *Malley* v. *Briggs*, 475 U.S. 335; 106 S.Ct. 1092; 89 L.Ed.2d 271 (1986).

In *Anderson* v. *Creighton*, 483 U.S. 635; 107 S.Ct. 3034; 97 L.Ed.2d 523 (1987), the Supreme Court stated:

> The general rule of qualified immunity is intended to provide governmental officials with

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16 **In *Courson*, the court determined that the officers were entitled to qualified immunity because the law was not clearly established at that time. Thus, the evaluation of the conduct against an unknown legal standard was deemed impossible.**

> the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages. (Citations omitted). Where that rule is applicable, official can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule, without entangling themselves in the vagaries of the English and American common law. 107 S.Ct. at 3040.

Relative to the claims of excessive force, the clearly established law has been set forth in *Graham* v. *Connor*, 490 U.S. 386; 109 S.Ct. 1865; 104 L.Ed.2d 443 (1989), where in the Supreme Court has set forth the following criteria for determining whether the Fourth Amendment has been violated:

> . . with respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" *Johnson* v. *Glick*, 4812 F.2d at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.
>
> 109 S.Ct. at 1878-79.

The record before this Court reflects that on April 23, 1988, all responding deputies requested that Petitioner drop his weapon. Although this request was repeated over and over, Petitioner continued to advance upon Deputy Bellino. Petitioner continued to threaten others with the gun. When Petitioner was within fifteen to twenty feet, Deputy Bellino fired at Petitioner, striking Petitioner's arm. Deputies Sweat and Burkey attempted to stop Petitioner's advance by verbal commands. Deputy Bellino reasonably believed his life was in danger because the Petitioner exhibited behavior that any reasonable officer would have perceived as life threatening. *Rhodes* v. *McDaniels*, *supra*.

At that time and in that place, Respondents Bellino, Sweat, and Burkey objectively, and in good faith, believed their actions were lawfully and properly executed in the performance of their duties. As the issue of "qualified immunity" is purely a question of law for this Court to decide, *Dominique* v. *Telb*, 831 F.2d 673 (6th Cir. 1987), Respondents Bellino, Sweat, and Burkey assert that the trial court's dismissal was proper on this basis. (R.56, Magistrate's Report and Recommendation, pp. 18-20).

VI.

THE TRIAL COURT PROPERLY CONCLUDED THAT FURTHER DISCOVERY WAS UNWARRANTED UNDER THE FACTS OF THE INSTANT CASE.

The trial court properly concluded that further discovery would not provide the Petitioner with any additional support. The Petitioner did have opportunity to conduct discovery. The trial court did not abuse its discretion in precluding any further discovery. See *Rhodes*, *supra*. There, the Court concluded that further discovery was not warranted although the complaint had only been filed for six months before the trial court dismissed the matter and precluded further discovery. In *Rhodes*, the plaintiff's decedent died as a result of a fatal shooting.

RELIEF REQUESTED

WHEREFORE, Respondents, TOWNSEND, HARDAWAY, HORVATH, LAUWERS, GRUBER, SWEAT, BURKEY, BELLINO, MONROE COUNTY DISPATCH, PROSECUTOR WILLIAM FREY, and the MONROE COUNTY PROSECUTOR'S OFFICE, respectfully request that this Honorable Court deny Petitioner's request for Certiorari, affirming the trial court's Order Granting Summary Judgment to Respondents.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

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Dated: September 28, 1993